IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-694, 72-758, 72-791, 72-929

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*, *Appellants*,

v.

EWALD B. NYQUIST, ETC., *et al.*, *Appellees*,

SENATOR WARREN M. ANDERSON, ETC., *Appellant*,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*, *Appellees*,

EWALD B. NYQUIST, ETC., *et al.*, *Appellants*,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*, *Appellees*,

PRISCILLA L. CHERRY, *et al.*, *Appellants*,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY, *et al.*, *Appellees*,

On Appeal from the United States District Court for the Southern District of New York

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS

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The National Jewish Commission on Law and Public Affairs hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief

amicus curiae out-of-time. As is indicated by letters on file with the Clerk, the movant has obtained the consent of the parties to this case for the filing of such a brief.

The National Jewish Commission on Law and Public Affairs has participated amicus curiae, usually with the consent of the parties, in most of the cases affecting the Religion Clauses of the First Amendment over the past several Terms. See, *e.g., Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Walz* v. *Tax Commission,* 397 U.S. 664 (1970); *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Levitt* v. *PEARL,* No. 72-269, O.T. 1972. Because of the expedited briefing schedule in the present cases and as a result of the absence from the United States of counsel who had been principally involved in preparing the briefs for the movant in the cases heard in prior Terms, permission for the filing of the attached brief was not sought in time to have it submitted as required by Rule 42. Nor, for these reasons, was the brief drafted in time to be filed on or before the date for the filing by the parties.

The position taken by the National Jewish Commission on Law and Public Affairs with regard to the constitutional issues in this case differs from that of the parties. From counsel's examination of the briefs filed to date, it appears that none presents the point of view stated in the attached brief.

There is, of course, precedent for the filing of amicus briefs out-of-time in cases involving constitutional issues of such magnitude. See, *e.g.,* brief of the Center for Law and Education, Harvard University, in *Lemon*

v. *Kurtzman*, 403 U.S. 602 (1971). Particularly, when, as is true here, the briefing and argument schedule proceeded on an expedited basis, leave to file should be granted.

For the foregoing reasons the National Jewish Commission on Law and Public Affairs respectfully requests that leave be granted to file the attached brief amicus curiae out-of-time.

Respectfully submitted,

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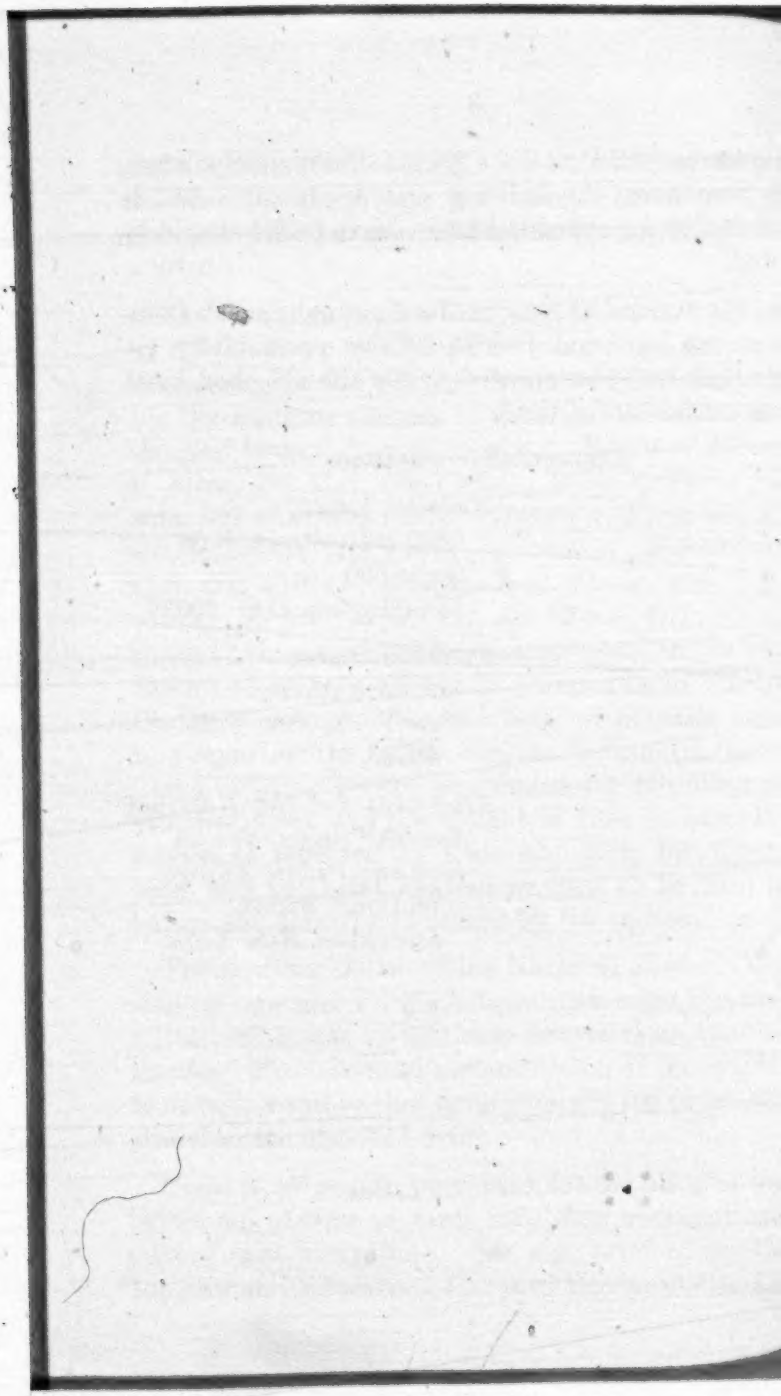

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On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS

INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrim-

ination and to represent the position of the Orthodox Jewish community on matters of public concern. The Commission is deeply committed to the preservation of constitutional rights for all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. Recognizing the importance of a healthy educational system to the welfare of a free society, the Commission firmly supports the advancement of educational opportunity for all American school children. We believe that our pluralistic society benefits through programs that promote the betterment of the education of all children.

The present case is of critical importance to the *amicus* because it affects the ability of Jewish parents meaningfully to exercise their constitutional right to educate their children at a *yeshiva* (Jewish parochial school), where intensive religious education is provided together with a full program meeting the State's secular educational requirements. Since the cost of education is substantial and is constantly rising under inflationary pressures, tuition at such schools has imposed a heavy burden on families of low and moderate income which they can ill afford to bear. Such financial burden has compelled some parents to forego a *yeshiva* education for their children. Others have shouldered this substantial expense together with the full taxpayer's burden of educating their neighbors' children at local public schools through state and local taxes. We believe that the New York legislature acted in accordance with established principles of fairness, equity and justice in granting a small measure of tax relief to parents of low and moderate income who

choose private education and thereby effectuate considerable savings to the taxpayers of the States.

QUESTION PRESENTED

Is a State barred by the First and Fourteenth Amendment from granting tuition assistance and tax relief to parents who relieve the State of substantial expenditures by sending their children to a private school at their own expense?[1]

ARGUMENT

I

A LAW WHICH GRANTS TAX RELIEF OR TUITION ASSISTANCE TO A NONPUBLIC SCHOOL PARENT—AS OPPOSED TO THE NONPUBLIC SCHOOL ITSELF—DOES NOT PRESENT THE DANGERS THAT THE FIRST AMENDMENT WAS DESIGNED TO PREVENT

The New York and Pennsylvania laws now before the Court differ in several respects from those which this Court found invalid in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). The most obvious difference—which both district courts discounted out-of-hand—is that the present laws confer financial benefits on the parents of nonpublic school children whereas the earlier statutes prescribed payments that were to be made directly to the schools. From the *Lemon* opinion itself, one might have supposed that this distinction could not be as readily ignored as the courts below believed, for

[1] Although we do not discuss the issue separately in this brief, we believe that Section 1 of the New York law, authorizing direct grants to schools for maintenance and repair of nonpublic school facilities which serve pupils from low-income families, should be sustained as a general welfare measure. Our reasons are substantially similar to those we outlined in our brief for two of the parties in *Levitt* v. *PEARL,* pending in this Court, Nos. 72-269, 72-270, and 72-271, and in the present brief at pp. 12-16, *infra.*

the Chief Justice distinctly noted, contrasting *Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *Board of Education* v. *Allen,* 392 U.S. 236 (1968), that the Pennsylvania statute challenged in *Lemon* provided financial aid directly to the schools (403 U.S. at 621):

> This factor distinguishes both *Everson* and *Allen,* for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school.

The New York law challenged here provides two forms of aid to parents—tuition assistance in annual amounts of $50 or $100 per child for those at the very bottom of the income scale (with taxable income of less than $5,000 per year) and a form of tax relief (mistakenly characterized as a "tax credit" by the plaintiffs and the district court) on a progressive scale for parents of nonpublic school children whose annual taxable income is $25,000 or less. The Pennsylvania statute prescribes uniform tuition assistance of $75 per child to all parents of nonpublic elementary school children and $150 to parents of nonpublic secondary school children. Both lower courts assumed erroneously that by giving money to a parent who has paid—or will pay—tuition to a nonpublic school, the State is using the parent as a "conduit" for funds to the school, so that the payment is indistinguishable from a direct transfer to the school from the public treasury. The plaintiffs also maintain that a reduced tax bill for those who send their children to nonpublic schools is indistinguishable from a cash payment to them—a position rejected by a majority of the federal district courts in New York but accepted by a three-judge dis-

trict court in Ohio. *Kosydar* v. *Wolman, appeal pending,* No. 72-1139. Accordingly, they argue that a "tax credit," as well as tuition assistance, violates the First Amendment.

In both *Lemon* and in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), where the "excessive entanglement" principle was first enunciated, this Court distinguished, in no uncertain terms, between the entangling effect of "a direct money subsidy" to a religious institution and the consequence of an indirect financial benefit such as tax relief for, or payments to, private individuals who may choose to share such a benefit with a religious institution. In the first case, there is a substantial likelihood of "sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ." *Walz* v. *Tax Commission,* 397 U.S. at 675. In the second, there are only the usual relationships between the government and a taxpayer or between the government and a private recipient of public funds.

There are, of course, a host of welfare programs now being administered throughout the nation—on both local and national levels—which provide cash payments out of a public treasury to needy individuals. The beneficiaries are then free to use any part—or, indeed, all—of those payments for religious purposes. A recipient of Social Security, for example, may sign over his entire check to a church, and the payment is not viewed as an imperissible transfer of government funds to a religious institution or as "entanglement" by government in church affairs. Welfare recipients may also choose to contribute from their benefits to the church collection plate; the source of the funds does not prohibit or taint that voluntary act.

Tuition assistance is, of course, different from an unrestricted welfare grant in that it is given *only* to those who privately pay a nonpublic school for a child's education. But this precondition is a way the State has of ascertaining which individuals need the particular form of aid. It does not, *ipso facto,* justify a court in ignoring the actual recipient of the funds and his voluntary decisions and treating the payment as if it were made directly from the public treasury to the school. The New York statute, for example, does not provide an across-the-board subsidy which a private school can, entirely at its own option, convert into a tuition increase for all its students. By limiting beneficiaries to those whose incomes are at or slightly above the poverty level, New York has carried out a very real welfare purpose—it has significantly eased the heavy burden that this class of beneficiaries bears if its members choose private education (which may include religious training) over public education.

There is, as we have shown above, no danger of entanglement of the kind proscribed by *Walz* and *Lemon.* Indeed, the evils which *Walz* warned against —"sponsorship, financial support, and active involvement of the sovereign in religious activity" (397 U.S. at 668)—are simply not present when the State, in recognition of the cost to parents of private education and the extent to which their choice ameliorates the drain on the public treasury, gives the individual parents—and not the schools—some financial benefit that they may keep for themselves. If a parent decides to pass that benefit to a religious school, he is doing so of his own volition, and government is no more involved in "sponsorship" or "financial support" than it is when a federal employee gives a small percentage of his biweekly pay to his neighborhood church.

This is all the more true when the State's benefit is given not by way of a cash payment to the parent but by some form of tax relief. Surely a State may exempt from part of its income tax burden those who, in its view, draw less than the average citizen on State services. If, to remain with the subject of education, a state legislature granted tax relief to all taxpayers having no children (on the theory that they derived no direct benefit from the public school system), it could hardly be argued that the relief was arbitrary. Indeed, such an exemption would fit well with this Court's oft-stated view that taxation is the means by which the burdens of government costs are distributed among those who enjoy the benefits of government services. *Thomas* v. *Gay,* 169 U.S. 264, 276, 277 (1898); *Welch* v. *Henry,* 305 U.S. 134, 144 (1938).[2]

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[2] See, for a traditional statement of this theory, Cooley, *The Law of Taxation* (4th ed.), § 89, p. 213:

> If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit each receives from the protection the government affords him; but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of government, that the benefit received from the government bears some proportion to the property held, or the revenue enjoyed under its protection; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximations to justice and equality.

The test stated by the late Justice Frankfurter for a majority of this Court in *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940), was "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." And, as the Court noted in that case, it is for state legislatures to devise "just and productive sources of revenue" and not for courts "to inject themselves in a merely negative way into the delicate processes of fiscal policy-making." 311 U.S. at 445.[3]

Accordingly, this Court has sustained local taxing provisions on a finding that they are based on grounds of difference having a fair and substantial relation to the object of the state legislation. *E.g., Bell's Gap R.R. Co.* v. *Pennsylvania,* 134 U.S. 232, 237 (1890); *Rogers* v. *Hennepin County,* 240 U.S. 184, 191 (1916);

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[3] See also *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509-510 (1931) (citations omitted and emphasis added):

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation.
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis,* and when subjected to judicial scrutiny they must be presumed to *rest on that basis if there is any conceivable state of facts which would support it.*
>
> The restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution.

Louisville Gas Co. v. *Coleman*, 277 U.S. 32, 37, 40 (1928); *Allied Stores, Inc.* v. *Bowers*, 358 U.S. 522, 526-528 (1959).

Only a few weeks ago, this Court upheld an Illinois statute subjecting only corporations, and not individuals, to ad valorem taxes on personal property, citing many of its earlier cases, including *Carmichael* v. *Southern Coal Co.*, note 3, *supra*. The Court held again that in taxation, even more than in other fields, legislatures possess the greatest freedom of classification, which can be overcome only by an explicit demonstration that the classification is constitutionally impermissible. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, Nos. 71-685 and 71-691, decided February 22, 1973.

The New York legislature has determined, in Sections 3, 4 and 5 of the statute here under attack, that it is equitable to recognize in the tax structure the fact that New York State spent an average of $610 per child to provide public school education in 1969-1970, and that a parent who refrains from using the public schools for his children is saving public funds. As an intermediate New York court put it (*St. Barbara's Roman Catholic Church* v. *City of New York*, 243 App. Div. 371, 374, 277 N.Y. Supp. 538, 541 (1935)):

> No doubt this parochial school is enabled to function to the advantage of the State and City, in large measure through the services of the members of this society. The taxes which the Legislature by the statute quoted requires the city to forego are infinitesimal in amount compared with the cost to the community to educate the pupils of this parochial school should it become necessary to do so by different public facilities. The purely monetary benefit which accrues to the city through this exemption by the Legislature far exceeds in amount the taxes cancelled.

Is it constitutionally impermissible for New York (or Pennsylvania or Ohio) to take account of these savings by alleviating, in some slight degree, the tax burden of the parents whose choice makes them possible? What New York has done by its tax relief statute parallels the relief provision on Section 319 of the Social Security Act of 1965, which recognized that members of the Amish church were opposed, by reason of conscience, to old-age insurance, including Social Security. Since they refuse the benefits of Social Security, the Amish are now justly exempted from federal FICA and self-employment taxes by Sections 1402(h) of the Internal Revenue Code. This tax waiver is presently worth almost $600 a year to an employed person earning $10,000 and over $800 to a self-employed person with the same income. Whether or not some part of the tax benefit is used for religious purposes, the exemption is an equitable and fair means of allocating a tax burden.

The tax structure provides many varied incentives for the expenditure of private funds—often in a way which could not be countenanced by direct grants from the public treasury. The deductibility of mortgage interest and local property taxes is an incentive to home ownership, although direct grants to individuals to buy homes has not been thought proper. Nor could the federal government pay a cash subsidy to every man and woman who marry; yet the financial advantages of a joint income-tax return amount to a public bounty for those who marry. The same is, of course, true of the deductibility from gross income of contributions to churches and religious organizations. All these provisions, along with tax credits for retirement income (I.R.C. § 37), investment in new machinery

(§ 38), foreign income taxes (§ 901), and expenditures for work incentive programs (§ 40) are part of a permissible tax structure. Indeed, even the financing of state and local election campaigns—which might present serious constitutional questions if funding were provided directly—is now the subject of a tax credit provision. See § 41 of the Internal Revenue Code.

It is no answer to maintain, as the plaintiffs have done (and as the district court did in *Kosydar* v. *Wolman, supra*) that the beneficiaries of the reduced tax are overwhelmingly Roman Catholics and that the law is, therefore, a means of benefiting one religious faith. This argument—which would invalidate the law on the ground that its "primary effect" is to aid religion—rests on premises which have never been accepted in constitutional litigation and which would have mischievous consequences. Would it be a basis for declaring a local welfare law unconstitutional that a plaintiff could demonstrate that an overwhelming majority of recipients are black? Are the federal Economic Opportunity statutes violative of the Equal Protection Clause because they benefit principally Mexican-Americans, blacks and other racial or national minorities? Surely the fact that a generally desirable public welfare law may be of more advantage to individuals who adhere to religious faiths than to others does not totally invalidate its purpose or render its effect unconstitutional. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), this Court sustained Sunday Closing legislation even though the selection of Sunday as the uniform day of rest favored religions that observe that particular day. "The 'Establishment' Clause," the Court noted, "does not bar federal or state regulation of conduct whose reason or effect

merely happens to coincide or harmonize with the tenets of some or all religions." 366 U.S. at 442. Similarly, the fact that a large majority of the parents who send their children to nonpublic schools today are motivated by religious convictions should not invalidate a law that offers the same benefit to all, whether they attend religious or totally secular private schools. Indeed, notwithstanding the assertions made by the plaintiffs and certain *amici*, the effect of such legislation may well be to increase the percentage of nonpublic-school students who attend *secular* private schools where no religion whatever is taught. New York and Pennsylvania should not be prohibited from achieving that goal merely because most of *today's* beneficiaries are of the Catholic faith.

II

THE LEGISLATIVE JUDGMENT IN "TRAVERSING THE TIGHT ROPE" BETWEEN ESTABLISHING AND FREE EXERCISE SHOULD BE GIVEN GREAT DEFERENCE BY THIS COURT

In substantially all the religion cases of the past several Terms this Court has recognized that there is an ultimate conflict between the Establishment and Free Exercise Clauses of the First Amendment taken to their logical extremes. See, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664, 668-669 (1970). No fact situation presents that conflict more strikingly than the difficult dilemma of conscientious parents who feel compelled by religious conviction to send their children to schools where they can be given religious training along with the secular knowledge that is needed by every responsible citizen in our society. Jewish parents in low or moderate income brackets face cruel and heartbreaking decisions when they are forced to spend between $500

and $1500 per year to educate a child in the kind of school which their religious faith demands. For an observant Jew, the duty of imparting a thorough knowledge of Judaism is a religious precept of the first magnitude; the obligation "to teach [Torah] diligently unto thy children" (*Deuteronomy* 6:-7) is on a par with the observance of the Sabbath and the other most important divine commands. The experience of the Jewish people in the Soviet Union—where religious education is generally unavailable—demonstrates how essential to the survival of the faith is the continued existence of Jewish day schools. Jewish education is, in short, of the same importance and magnitude to the Jewish faith as the principle of separation from worldly education is to the Amish. See *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

Because of spiraling educational costs, many observant Jews are today forced to the cruel choice of abandoning this aspect of their religious faith simply in order to feed their families. Do not the policies of the Free Exercise Clause and the principles of religious and cultural pluralism on which this nation are based authorize a state legislature—or, for that matter, the Congress—to take ameliorative steps to prevent the eradication of religious schools?

In an area where no "absolutely straight line" can be drawn and where, by the very nature of the constitutional principles, there must be "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970), the legislative judgment as to how to "traverse the 'tight rope' " (397 U.S. at 672) should be accorded great deference. In this field,

as in the enforcement of the Equal Protection Clause of the Fourteenth Amendment, it suffices, therefore, for this Court "to perceive a basis upon which the Congress [or the State legislature] might resolve the conflict as it did." *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966).

The analogy to enforcement of the Equal Protection Clause is, we submit, borne out by the nature of the danger against which the Establishment Clause protects. For, as the Court observed in *Walz,* the ultimate goal is to avoid "excessive government entanglement with religion" (397 U.S. at 674) while preserving "the autonomy and freedom of religious bodies" (*Id.* at 672). The many factors which enter into this accommodation are similar in kind and degree to the "various conflicting considerations" enumerated in *Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966). Weighing the degree to which government agencies will become involved in religious affairs under a scheme of State financing of secular education is a function for which a court is ill-suited. A legislature, on the other hand, may consider what alternatives are available for the improvement of educational standards and can devise techniques for avoiding the entanglement which the Constitution forbids. It is also in a far better position to weigh the public need for financial assistance of the kind provided by the challenged statutes and the effect on the welfare of the State and the Nation if it is withheld from religiously affiliated institutions.[4]

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[4] See, *e.g.*, Kauper, "Government and Religion: The Search for Absolutes," 15 *Michigan Law Quadrangle Notes* (1971):

> In short, the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters;

A final word must be said on the pernicious and deplorable assertion which is again made in this case by certain *amici* that the statutes are constitutionally invalid because they authorize payment from the public treasury to racially segregated schools. We view it as particularly unfortunate that this claim is injected by Jewish organizations, who rely not on evidence in the record, but on their own assessments of what may be "substantiated at trial" (See Brief of American Jewish Committee, *et al.*, Nos. 72-459, 72-620, pp. 25-34). To even suggest an analogy between the establishment and financing in the South of private "academies" designed for no purpose other than the preservation of racial segregation and the operation and support of Jewish religious schools—which are part of a glorious tradition of learning dating back more than 3,000 years—is highly offensive to us and to the many American citizens of the Jewish faith whom we represent. The Biblical command incumbent upon each adult male of the Jewish faith to provide religious instruction for his children neither awaited nor depended upon the outcome of *Brown* v. *Board of Education*, 347 U.S. 483 (1954). And the eligibility of the more than 400 Jewish day schools—established in this country to enable the parents of the approximately 70,000 children now attending them to fulfill this Biblical obligation while affording them a complete secular education—should not, by the same token, turn on the racial distribution of students at the schools. It is plain that neither as to the schools affected here, nor as

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that there is latitude for some play in the joints; and that in the area of church-state relations as in all other areas of public concern where policy considerations loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process.

to the legislative programs which are challenged, can it be said that their "purpose, motive and effect . . . is to unconstitutionally circumvent the requirement first enunciated in *Brown* v. *Board of Education* . . . ." *Brown* v. *South Carolina State Board,* 296 F. Supp. 199 (D.S.C. 1968), *affirmed,* 393 U.S. 222 (1968).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court in Nos. 72-753, 72-791, and 72-929, and affirm the judgment of the District Court in No. 72-694.[5]

Respectfully submitted,

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[5] For the same reasons, the judgment of the District Court in Nos. 72-459 and 72-620 should be reversed.